FOR ARGUMENT

Supreme Court, U.S.
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No. 90-5193

In The

Supreme Court of the United States

October Term, 1990

DAWUD MAJID MU'MIN,

Petitioner,

v.

VIRGINIA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Virginia

REPLY BRIEF FOR PETITIONER

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ARGUMENT IN REPLY

A. The Trial Judge's Opinion that the Jury Panel was Impartial Has No Bearing on the Constitutional Issue Presented in Petitioner's Case.

Respondent argues at length that petitioner is not entitled to relief because the trial judge found the jury panel impartial and this finding is entitled to great deference. Respondent's Brief at 15-18. However, on this record, the trial judge's finding of impartiality cannot cure the constitutional inadequacy of the inquiry that produced it. While a trial judge is best situated to determine an individual juror's competency to serve in a particular case, *see generally Wainwright v. Witt*, 469 U.S. 412, 428 (1985), this determination must be made on the basis of adequate information. *See Patton v. Yount*, 467 U.S. 1025, 1038 (1984) (trial judge's finding of impartiality of individual jurors was made after extensive *voir dire* regarding the media accounts to which jurors had been exposed). Indeed, as the Court has noted, without "an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981).

In this case, of course, the constitutional violation arose from the fact that the judge refused to ask or permit proper *voir dire* questions. Because the *voir dire* was wholly inadequate to determine the effects of the pervasive prejudicial pretrial publicity, the trial judge's finding of impartiality is unreliable, and cannot be accorded the deference to which such findings are normally entitled.

Cf. Pate v. Robinson, 383 U.S. 375, 386 (1966); *Groppi v. Wisconsin*, 400 U.S. 505, 508 n. 5 (1971).

B. Petitioner does not Advocate a Rule that Would Remove the Trial Court's Discretion or Needlessly Prolong or Complicate the Jury Selection Process.

Respondent makes a number of points that can best be characterized as "parade of horribles" arguments. Respondent's Brief at 30-34. First, respondent asserts that petitioner seeks to completely eliminate a trial judge's discretion whether to permit questions regarding prejudicial pretrial publicity, as well as discretion to regulate the scope and nature of the questioning. This is simply incorrect. Petitioner's opening brief acknowledges that a trial judge has broad discretion to determine in a particular case the best means of detecting juror bias. However, as with many other decisions that are placed in a trial judge's discretion, his judgment is not absolute, nor is the exercise of his discretion beyond review. In order to safeguard the constitutional right to a fair and impartial jury the rule must be that the trial judge is required to conduct an *adequate* inquiry under the circumstances. Neither the adequacy of the inquiry nor the danger of a biased jury presented by the circumstances can be left entirely to the unreviewable judgment of the trial judge. There will be circumstances under which the trial judge *must* conduct a probing *voir dire* inquiry regarding adverse pretrial publicity. It is for this reason that due to the compelling circumstances of this case – where the publicity was

particularly powerful in content, volume and tone[1] – the trial judge was obligated to permit at least some *voir dire* questioning regarding the jurors' exposure to prejudicial news accounts. Petitioner's Brief at 37-38; *see also Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976); *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

Respondent also asserts that if petitioner prevails, *voir dire* will necessarily be extensive and prolonged in every case. This is simply not true. As the dissenting Justices of the Virginia Supreme Court noted, petitioner did not (and does not) seek "to propound any question he wished, or to extend voir dire questioning *ad infinitum*." *Mu'Min v. Commonwealth*, 239 Va. 433, 454, 389 S.E.2d 886, 899 (1988); J.A. 118. Rather, after making a substantial showing of pervasive prejudicial media coverage of this case, defense counsel sought to have the trial judge ask several minimally intrusive questions regarding the

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[1] Similarly, respondent's contentions that the news accounts in petitioner's case were not "uniquely involved, or 'inextricably bound up' in the facts of Mu'Min's case in such a way as to inflame or 'intensify' any juror's possible bias," *see* Respondent's Brief at 24, is equally wrong. The press accounts did not involve standard crime reporting. Rather, petitioner's case was caught in a national atmosphere of near hysteria involving crimes committed by incarcerated persons. *See* Petitioner's Brief at 5-9; *see also Mu'Min v. Commonwealth*, 239 Va. at 454, 389 S.E.2d at 899; J.A. 118.

In this regard, it is important to note that the majority of the Virginia Supreme Court did not dispute the three dissenting justices characterization of the news accounts as unusual and prejudicial. Rather, in the majority's view, the volume, nature and content of the publicity was irrelevant. It believed that a criminal defendant was never entitled to know what news accounts potential jurors had been exposed to.

media coverage. *See Turner v. Murray*, 476 U.S. 28, 38 (1986). At most, the questions propounded by petitioner's counsel would have added a few hours to the jury selection process in this capital case.[2] Certainly, after a showing such as was made here – an unusual amount of prejudicial publicity to which the overwhelming majority of the panel had been exposed[3] – the few questions requested by petitioner's counsel would have constituted a minimal addition to the jury selection process.[4] *Cf. Gardner v. Florida*, 430 U.S. 349, 359-60 (1977) (plurality opinion).

Respondent's dire predictions recall the similar warnings which the Virginia Attorney General sounded in *Turner v. Murray, supra*. There, the Virginia Attorney General's Office maintained that if Turner prevailed, *voir dire* would be needlessly protracted. Brief for Respondent, *Turner v. Murray* at 15-16. The assertion is as meritless in petitioner's case as it was in *Turner*. Quite simply, there is no reason to believe that a ruling in petitioner's

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[2] The entire jury selection process took substantially less than a trial day.

[3] As respondent concedes in its brief, at least eight of the twelve jurors who were ultimately seated in this case had read news accounts regarding the case.

[4] Furthermore, it is important to keep in mind that for petitioner to prevail this Court does not have to determine that the exact questions (either in form or in number) should have been asked. *See generally Mu'Min v. Commonwealth*, 239 Va. at 457-58, 389 S.E.2d at 901; J.A. 122. Regulation of the questioning will still be left to trial judges. In this case, the trial judge permitted no questions whatsoever regarding the content of the juror's exposure to prejudicial pretrial publicity, and it is this ruling which comprises the constitutional violation.

favor in this case would have any adverse administrative impact either.

C. Respondent's Interpretation of *Turner v. Murray* is Unduly Restrictive.

A large portion of respondent's brief is spent attempting to convince the Court that *Turner v. Murray*, 476 U.S. 28 (1986), only applies in cases which involve the risk of racial discrimination influencing a capital sentencing jury's decision whether or not to impose the death penalty. *See* Respondent's Brief at 28-31. This view of *Turner* is erroneous.

While it is true that the specific facts of *Turner* had to do with racial prejudice infecting the discretion afforded a jury at the sentencing phase of a Virginia capital trial, this Court's decision cannot be read in a vacuum. The *Turner* Court drew upon *Ham v. South Carolina*, 409 U.S. 524 (1973); *Ristiano v. Ross*, 424 U.S. 589 (1976); *Rosales-Lopez v. United States*, 451 U.S. 182 (1981), as well as a number of the capital decisions of this Court, in the process of invalidating a death sentence obtained under circumstances where the trial judge failed to permit any *voir dire* regarding racial bias in a case involving an interracial crime. Thus, seen from the proper vantage point, *Turner* is just one case in a series of decisions by this Court which stand for the broader due process principle that a trial judge is obligated to take whatever steps are necessary in order to safeguard a defendant's right to a verdict based solely on the evidence and the relevant law.

Turner, of course, did acknowledge that the risk that extraneous influences may affect the jury's ability to render a verdict based only on the record evidence and relevant legal principles is especially high during the sentencing phase of a capital case involving an interracial crime, such as petitioner's case. However, it did not hold that the only questions a capital defendant is constitutionally permitted to ask in a capital trial are those which have to do with racial animus. Rather, *Turner* and its antecedents are rooted in the more general constitutional guarantee that all the circumstances of a particular case must be considered in determining a trial judge's responsibility to secure a capital defendant his right to a fair and impartial jury at both phases of a bifurcated trial.

D. Petitioner's Eighth Amendment Claim was not Waived in the State Courts.

Respondent asserts that to the extent that petitioner relies upon the Eighth Amendment, his claim is not properly before the Court. Respondent's Brief at 26-27. This contention is erroneous.

At trial, petitioner's counsel repeatedly relied upon the Eighth Amendment in support of his request to ask potential jurors about the content of the publicity to which they had been exposed. *See, e.g.*, J.A. 41, 64, 69, 70. On direct appeal to the Virginia Supreme Court, as respondent concedes, *see* Respondent's Brief at 26, petitioner referred to the greater demand for reliability required by the Constitution in capital cases. Similarly, in the petition for rehearing filed in the state courts, petitioner discussed the death penalty aspects of the case and

cited in this Court's decision in *Woodson v. North Carolina*, 428 U.S. 280 (1976). *See* Petition for Rehearing at 3; *see also Taylor v. Illinois*, 484 U.S. 400, 406-07 n. 9 (1988) (Sixth Amendment claim properly preserved where counsel cited several Sixth Amendment decisions of this Court in the state appeal brief).

Furthermore, one of the questions specifically presented in the petition for certiorari was whether the trial court's actions in this case violated the Eighth Amendment. Pet. for Cert. at i. Respondent did not object to the so-called "generic reference" to the Eighth Amendment by means of a brief in opposition to the petition, and its attempt to assert a procedural bar to petitioner's Eighth Amendment claim now is an inappropriate afterthought. Because respondent did not make this argument in a brief in opposition to the petition for writ of certiorari, it should be deemed waived. *See* Rule 15.1 of the Rules of the Supreme Court of the United States; *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985).[5]

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[5] Equally incorrect is respondent's contention that petitioner's counsel complained only of the amount of publicity and not any specific prejudicial information in the news accounts. Respondent's Brief at 43. Trial counsel specifically referred to a number of prejudicial facts in the publicity which warranted *voir dire*, including the fact that petitioner allegedly confessed to committing this crime, petitioner's alleged involvement in another offense, the political furor which occurred in the aftermath of this offense, and comments about the case made by politicians and candidates for office. *See* J.A. 9-13.

CONCLUSION

For the reason set forth above and in petitioner's opening brief, the judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

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